



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

ELC SUIT NO. 18 OF 2018

ESTHER M. MATUNDU.....PLAINTIFF/RESPONDENT

VERSUS

MWANGA KISYUKA.....DEFENDANT/APPLICANT

RULING

1. The ruling is in respect of the Defendant's/Applicant's notice of motion application dated 6th May, 2020 and filed in court on even date. The application is expressed to be brought under Order 8 Rule 3(1) of the Civil Procedure Rules 2010 and all the other enabling provisions of the laws of Kenya. It seeks for the following orders;

1. That the Applicant be granted leave to amend his defence filed herein on 14th March, 2018 as per the draft annexed hereto.

2. That the draft amended defence annexed hereto be treated as the Plaintiff's amended defence and that the same be deemed as having been duly filed and served.

3. That the costs of this application be in the cause.

2. The application is predicated on the ground on its face and is supported by the supporting and further affidavits of Mwang'a Kisyuka, the Defendant/Applicant herein both sworn at Nairobi on the 6th May, 2020 and 18th June, 2020.

3. The Plaintiff/Respondent has opposed the application vide her replying affidavit sworn at Machakos on the 26th May, 2020 and filed in court on 3rd June, 2020 respectively.

4. In paragraphs 3, 4, 5, 6 and 7 of his supporting affidavit, the Defendant/Applicant has deposed that there have been various applications filed by both the Plaintiff/Respondent and the Defendant/Applicant herein in which certain aspects of the defence have come out to be vague, that for instance, the defence states in paragraph 3 thereof that **"land parcels Nzau/Nziu/855 and Nzau/Nziu/712 are family properties which I hold them in trust of other beneficiaries ..."**, that it would be in the interest of justice that his defence is amended to state clearly and specifically the names of the persons for whom he holds any of the disputed properties in trust, that the amendments sought will not in any way change the cause of action in this matter and that the amendment will not prejudice the Plaintiff/Respondent.

5. In paragraphs 3, 4, 5, 6 and 7 of her replying affidavit, the Plaintiff/Respondent has deposed that the application is frivolous, vexatious and an abuse of the court process and a waste of judicial precious time and should be dismissed since it lacks merit, that in reference to all the grounds of the notice of motion application, the same do not raise any material facts to necessitate the proposed amendments and that the proposed amendments will prejudice her as the aim is to delay the matter, that the proposed amendments of the statement of defence in paragraph 5 does not raise the question on the mode/nature on which the parcels of land Nzau/Nziu/855 and Nzau/Nziu/712 are family properties which the Defendant/Applicant holds in trust for other beneficiaries and which is different from what is contained in the initial defence, that she is advised by her advocates on record which advice she verily believes to be true that the proposed amendment in paragraph 5 of amended plaint(sic) relates to an issue which this court determined in the notice of preliminary objection dated 10th April, 2019 and hence the issue is *resjudicata* and that the Plaintiff herein discloses reasonable cause of action in law and it is scandalous, frivolous or vexatious it is otherwise an abuse of the process of the court hence the Defendant/Applicant should prepare for hearing instead of employing delay tactics.

6. In rejoinder the Defendant/Applicant has deposed in paragraphs 4, 5, 6, 7, 8, 9, 10 and 11 of his further affidavit that he has been advised by his advocate on record which advice he verily believes to be true that none of the issues raised in his proposed amended defence has previously been heard and determined by this court, that is of paramount importance that the locus of the Plaintiff/Respondent to institute the

proceedings herein is canvassed, that it is also necessary that the cause of action that led to the institution of the suit herein be articulated at the hearing of the suit and the amendments that he seeks in his defence are meant to give the court an opportunity to hear the same, that no valid grounds are advanced by the Plaintiff/Respondent as to why the application should not be granted, that he is advised that the court has the necessary power and discretion to allow the amendment of pleadings of parties at any stage of the case, that hearing of the matter herein has not commenced and therefore no prejudice will be suffered by the Plaintiff/Respondent if the court allows the application and that should his statement of defence be lacking in any way, the Plaintiff/Respondent will have the opportunity to respond in her reply to the defence as well as at the hearing thereof but she cannot be seen to dictate to the Defendant/Applicant on the kind of defence that he should make at this stage.

7. On the 6th May, 2020 the court gave directions that the application be canvassed by way of written submissions. By the time of writing this ruling, it is only the Defendant's/Applicant's counsel who had filed his submissions.

8. In his brief submissions the Defendant's/Applicant's counsel submitted that the proposed amendment will give the court the opportunity to hear the merits of the cause of action. The counsel added that the draft statement of defence does not introduce new issues and that no prejudice will be suffered by the Plaintiff/Respondent if the application is allowed.

9. It was also the counsel's submissions that the court has wide and discretionary powers to allow amendment of pleadings if the amendment will assist the court determine the real question in controversy.

10. In support of his submissions, the counsel relied on the case of *Elijah Kipngeno Arap Bil V Kenya Commercial Bank Ltd [2013] eKLR* where the Court of Appeal restated the law applicable to the amendment of pleadings as stated in **Bullen and Leak and Jacob's Precedents of Pleadings – 12th Edition and Capture in the court of Appeal decision in Joseph Ochieng & 2 Others V First National Bank of Chicago, Civil Appeal No. 149 of 1991 thus;**

“The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts.”

11. Having read the application together with the supporting, further affidavit as well as the replying affidavit and having read the submissions filed by the Defendant's/Applicant's counsel, it seems to me that the application herein was triggered by the ruling rendered by this court on 30th September, 2019 regarding the notice of preliminary objection dated 10th April, 2018 filed by the Defendant/Applicant. In the said ruling, the Defendant's/Applicant's notice of preliminary objection was dismissed with costs to the Plaintiff/Respondent herein. Be that as it may; it is clear that the substantive suit herein has not been heard and I would agree with the Defendant/Applicant that no prejudice will be occasioned to the Plaintiff/Respondent as she too will have the opportunity to amend her pleadings if she so desires. I further do agree with the Defendant/Applicant that the proposed amendment does not introduce a new cause of action.

12. In my view, the proposed amendment seeks to enable this court to determine the true, substantive merits of the case herein. In the circumstances my finding is that the application has merits and I hereby proceed to allow the application as hereunder.

1. The Defendant/Applicant is granted leave to amend his defence filed on 14th March, 2018 as per the annexed draft defence to the application.

2. The Defendant/Applicant will have 21 days from today to file and serve an amended defence upon which the Plaintiff/Respondent will have corresponding of similar number of days to amend and serve her plaint, if need be.

3. Costs of the application to be in the cause.

Dated, Signed and Delivered at Makeni via email this 30th day of June, 2020.

Mbogo C.G,

Judge

Ms. C. Nzioka – Court Assistant